

I N F O R M A T I O N

F O R

LAURENCE DUNDAS, eldest Son of Sir Thomas Dundas of Kerse, Baronet, by Lady Charlotte Fitzwilliam his wife; and for ROBERT BRUCE, Esq; of Kennet, one of the Senators of the College of Justice, his Tutor *ad litem*, Defenders,

A G A I N S T

Sir THOMAS DUNDAS of Kerse, Baronet, Pursuer.

SIR THOMAS DUNDAS of Kerse, the defender's father, insists in a process of reduction of certain settlements, and in particular a deed of entail executed by the deceased Sir Laurence Dundas in the year 1768, in which he has laid the pursuer, and the other heirs therein called to the succession of his Scotch estates, under the fetters and conditions of a very strict entail. Mr Dundas, the eldest son of the pursuer, has been called, alongst with the other heirs of the marriage, and substitutes in the entail, as defender, and to a certain extent he concurs in the defences which are pleaded upon the part of the heirs of the entail, against the conclusions of the pursuer's action. His interest, however, is materially different from that of the other defenders in many important particulars. In his character of heir of provision under the marriage-articles executed by the deceased Sir Laurence Dundas upon the occasion of his father and mother's marriage, he apprehends himself intitled to contest the powers of Sir Laurence to execute the entail now under reduction in the

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terms

terms which he thought proper to adopt ; these terms and these conditions being contrary to the obligations which he came under by his son's contract of marriage, and tending to defeat the right of succession which he thereby conferred upon the defender as the heir of the marriage. This being stated to the Lord Ordinary, his
 Jan. 15. 1783 Lordship, of this date, allowed the defender, and his tutor *ad litem*, to state their separate plea in a separate information ; in obedience to which appointment the following is humbly submitted upon the part of Mr Laurence Dundas.

It is unnecessary to trouble your Lordships with a recital of the different deeds, settlements, &c. executed by the deceased Sir Laurence Dundas in the period which elapsed between his son the pursuer's marriage, in 1764, and his own death in September 1781, upon the construction of which the decision of this question does depend. These have been already submitted to your Lordships in the informations for the pursuer and the other defenders. The defender Mr Laurence Dundas shall therefore state his particular plea, upon the supposition that your Lordships are already acquainted with the whole of these deeds and settlements, from the perusal of them in these different informations, without entering into any further quotation of them than is necessary for explaining the ground of his plea.

The deeds therefore executed by Sir Laurence Dundas fall clearly to be considered in a twofold point of view : 1st, With regard to those deeds which relate to the lands settled in the marriage-articles 1764 ; and, 2^{dly}, With regard to the other estates acquired by Sir Laurence since that period, over which he had an unlimited and absolute power, and which he could settle upon any series of heirs, and under any conditions whatever, without dispute or controul. With regard to these lands, the defender does concur in the defences which have been pleaded in the information for the other defenders ; and, like them, he does maintain to your Lordships, that Sir Laurence, having an indisputable right to lay that part of his property under any restrictions or limitations he pleased, and having exercised that power in a manner perfectly proper and legal, the pursuer, and all the other heirs of entail, must take up the succession to these estates under all these conditions and limitations, without exception ; the whole of these limitations, however strict, being perfectly rational, and perfectly consistent with the laws which regulate the power of entailers.

In so far as regards these lands, therefore, the defender con-
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curs in maintaining, that the conclusions of the pursuer's action are ill founded. With regard to the lands and estates in Stirling, Fife, and Clackmannan, which were comprehended in the articles of marriage 1764, the defender's plea is widely different; and in that particular he is now to maintain, that he, as the eldest son of that marriage, is intitled to set aside those conditions and limitations with which Sir Laurence thought proper to burden these estates; having inserted in the subsequent deed of entail conditions which he had no power to annex, and which, by the marriage-articles stipulated upon the part of Lady Charlotte Fitzwilliam and her relations, he expressly debarred himself from ever exercising.

Your Lordships will therefore attend to the nature of those special provisions which the defender's mother and her friends stipulated in favour of the heirs of this marriage, and which Sir Laurence Dundas agreed to, and became bound to make good to them. After binding and obliging himself, his heirs, &c. to execute a valid and effectual disposition to the whole of his lands and estate in the shires of Stirling, Clackmannan, and Fife, to his son Thomas Dundas in liferent, "and in trust, *quoad* the fee and property of the said lands and estate, for the use and behoof of the first, second, third, and other sons of the said marriage, and their respective issue-male," he immediately adds the following reservation; "but subject to the reservations, conditions, and limitations after mentioned." He then proceeds to state the particular nature of these reservations; and, amongst others, the following one: "Reserving also power and faculty to the said Sir Laurence Dundas, by any deed of appointment or nomination to be executed by him, *to destinate and carry on the line of succession of the said lands and estate in Scotland*, and thereby to *impose such conditions* and limitations upon the sons of the said intended marriage, and their issue-male, and upon the whole other persons who shall succeed by the disposition and deed of conveyance to be executed in terms of the above-recited deed of release, and by virtue of these presents, or any other deed of appointment to be executed by the said Sir Laurence Dundas, by virtue of the reserved powers above mentioned, as he shall judge proper, *and which may be effectual, by the laws of Scotland*, to disable them, or any of them, *from altering the course of succession* as thereby established, or from selling or disposing the lands in whole or in

part,

“ part, or *with charging the same with debts* farther than they
 “ shall be thereby authorised to do.”

Sir Laurence having thus laid himself under an express obligation to provide the defender, and other children of the marriage, in the fee and property of these different estates, did undoubtedly divest himself of that unlimited and uncontrouled power of administration which he formerly possessed over these estates; and had no subsequent reservation or limitation been added, the children of the marriage would have been clearly intitled to have taken up the succession to these estates in fee-simple, without regarding any condition or limitation which Sir Laurence at a subsequent period might have thought proper to burden that property with. Such would have been the clear effect of the obligation which he thereby came under; and all that your Lordships have now to attend to is, the nature and import of those reservations which he threw in to these marriage-articles, with the burden of which Lady Charlotte Fitzwilliam and her friends accepted of the stipulated provisions. That reservation is the only rule which your Lordships can attend to; and as a marriage-contract is well known to be an onerous deed, vesting in the heirs of marriage a right of credit as well as a right of succession, you will not think yourselves at liberty to stretch that reservation beyond its strict letter; on the contrary, will confine those reserved powers solely to what the party himself has literally restricted himself in the obligation he granted.

What, then, are the powers which Sir Laurence Dundas reserves in these marriage-articles? In general, “ to destinate and
 “ *carry on the line of succession* of the said lands and estate in
 “ Scotland,” the great leading object which he had in view. He descends, immediately thereafter, to a more explicit narrative of those powers he meant to reserve; “ to impose such conditions
 “ and limitations upon the sons of the said intended marriage,
 “ &c. as he shall judge proper, and which may be effectual, by
 “ the laws of Scotland, to disable them, or any of them, *from*
 “ *altering the course of succession* as thereby established, or *from*
 “ *selling or disposing the lands*, in whole or in part, or *with*
 “ *charging the same with debts.*” Such is the extent of these reserved powers, as explained by himself. Having, in the preceding part of these articles of agreement, provided to the sons of the marriage the property of these estates, he, with a view of preserving these estates in them and their issue, reserves to himself a
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power of carrying on the line of succession in such a way as shall be most effectual for that purpose. With that view, he reserves to himself also a power of laying them under such conditions only as may be effectual or proper for the purpose of preventing or disabling any of them from altering that course of succession which he might afterwards establish: and as no conditions could be more effectual for that purpose, he very naturally prohibits them from selling or disposing these lands, or putting it in the power of creditors to defeat the line of succession, by affecting it with their diligence for debts.

But further than that, the defender maintains, Sir Laurence's powers could not extend. He might settle and establish the line of succession; he might prevent the sons of the marriage from selling the lands, or contracting debts to affect them; but he could not subject them under any limitation or condition whatsoever, however rational or innocent such limitation might be, or however common and usual these may be in simple entails, where the tailzie has not come under any antecedent obligation in favour either of one set of heirs or another. Much less could he adject conditions which, so far from being innocent, might, in the event of certain possible cases, amount to a total forfeiture of these estates from one or other of the heirs of the marriage. Such a condition would neither be supported under the spirit or the words and terms of the reserved power; because, *so far from preserving* these estates to the children of the marriage in any fixed line of succession, it was, in fact, a total departure from that object, by altering the line of succession which he had in view to preserve, and carrying the estate in a line totally different. Yet Sir Laurence has undoubtedly fallen into that blunder. In the deed of entail executed in the 1768, he has exceeded the powers reserved in the marriage-articles, and laid the heirs of the marriage, the persons intitled to these estates, under conditions which undoubtedly will, in certain events, forfeit their right to them altogether, and defeat the very purpose which he had principally in view, the preservation of it in their family. The clause of entail here alluded to is the following: "Providing and declaring, that the whole heirs of tailzie above mentioned, both male and female, who shall succeed to my lands and estate above written, shall be holden and obliged to assume, bear, use, and carry, and constantly to retain the surname of Dundas, and arms of Dundas of Kerse, as their

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“ proper surname and arms, and no other surname or arms, in
 “ all time after their succession; and if any of the said heirs of
 “ tailzie shall do in the contrary, in that case the person or heir
 “ of tailzie so contravening shall, for him or herself, and for his
 “ or her presumptive heir of tailzie under this deed of settlement,
 “ forfeit, amit, and loose, all right and title whatever to my
 “ said lands and estate above written; and the same shall, *ipso*
 “ *facto*, fall, accresce, and appertain to the next heir of tailzie for
 “ the time being,” &c.; to which condition of bearing constantly
 “ the said surname and arms, and no other surname or arms
 “ whatsoever, the whole heirs of tailzie above mentioned are de-
 “ clared to be subject and liable through the whole succession, in
 “ all time coming.”

The defender does maintain to your Lordships, that this condi-
 tion, which is conceived in such express terms, and guarded un-
 der so severe a penalty, however rational and proper it might have
 been in the case of a simple entail, was clearly a condition *ultra*
vires of Sir Laurence to lay upon him, or the other sons of the
 marriage, to whom he had already come under an effectual obli-
 gation to convey the fee and property of these estates under those
 burdens alone which he had thought proper to ingross in Sir
 Thomas's marriage-articles. The extent of that reserved power he
 expressly specifies; and the defender has already submitted to
 your Lordships what he understands to be the sole extent of these
 reserved powers: yet a condition of this nature certainly does
 neither fall within the words nor the spirit of that reservation; and
 if so, the defender is not obliged to comply with them, unless he
 shall judge proper. The answer which is made to this argument
 is not a good one: “ That it is no more than an obligation laid
 “ in every entail upon the heirs thereby called to the succession.”
 That answer would have been very sufficient in the case of a simple
 entail, where the powers of the entailer are absolute and unlimit-
 ed, and where the heirs called in such entail must take the estate
 under the conditions which the entailer thinks fit to lay them un-
 der: but the case of the defender is widely different; and if the
jus crediti, which he came to possess under his father and mother's
 marriage-articles, is not to have the effect of intitling him to
 reject all conditions or restrictions not expressly reserved upon the
 part of Sir Laurence, he would wish to know in what the differ-
 ence betwixt him and a simple heir or substitute of an entail does
 consist. There certainly must be some difference betwixt the case of
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the one and the case of the other ; but if it is sufficient to answer, that such a condition is *usually inserted* in all entails, he and the other heirs of the marriage stand in no more favourable situation than the other substitutes in the entail. The substitutes are at common law intitled to reduce conditions or limitations which are deemed unusual and irrational ; and the privilege of the heirs of the marriage, it seems, extends no further. The marriage-articles therefore were totally unnecessary, since they carried no broader right or privilege to the heirs of the marriage, than what they would have possessed as simple heirs of entail ; and provided the condition usually occurs in deeds of entail, the defenders, as well as the more remote substitutes, must comply therewith, without any dispute.

But these consequences seem, with submission, too absurd to need a formal refutation ; and it is submitted, that the defender and the other children of the marriage are intitled to hold the possession of these estates, contained in the marriage-articles above-mentioned, free of all restrictions or limitations whatever not warranted by Sir Laurence's reserved faculty, and not expressly reserved therein : But much more is he intitled to object to this, or any other condition, which so far from being merely innocent, may have the effect of forfeiting that right which was stipulated in his favour by his mother and other relations. Should the defender succeed to a separate estate, which may perhaps be burdened with clauses of the same nature, and which may provide, in terms equally explicit, against his bearing any other surname or arms than those which may therein be permitted ; the undoubted consequence must be, that he will be obliged to make his election betwixt the two estates, and forfeit the one or the other. If, therefore, this condition is allowed to remain, the main object which Lady Charlotte's relations had in view must be totally defeated. They certainly meant to acquire to that Lady's children the property of this estate, and to make their condition better and not worse ; but it never could be in their view to deprive the children, whose interests they were thus providing for, of any privilege or right of succession which they already enjoyed. The defender means not to state hypothetical or barely probable cases, where he may be compelled to forfeit and lose the property of these estates by means of this condition, and making his election betwixt this and another of equal or greater value, which may chance to open to him ; but he will beg leave to observe, that events may happen, (*e. g.* an intermarriage with an heiress), where he may be obliged to make
such

such an election, and where, if the present condition is allowed to remain unreduced, he will be infallibly constrained to lose and give up all right and title to these estates provided to him by Sir Laurence in his mother's marriage-articles, and which he became bound to preserve with him and the other heirs of the marriage in an established course of succession. Upon this head he does submit to your Lordships, that Sir Laurence clearly exceeded his reserved powers, and annexed a condition, which, so far from preserving the order of succession to these lands with the heirs of the marriage, must have the effect of defeating that end altogether, as well as the obligation which he came under by the marriage-articles.

It is also said, "That Sir Laurence, by a subsequent proviso, has taken care that no hardship shall arise from this condition, in the case of the heir marrying an heiress, or succeeding to another estate." The defender denies that the subsequent proviso here alluded to can have that effect; and that the only purpose which it can have is, to make your Lordships more desirous of setting aside this unauthorised condition, from the evidence which it affords of the entailer's intention and wish to adhere most literally, in this deed of settlement, to the terms and to the spirit of that obligation, which he had formerly come under in his son's contract of marriage.

The clause which contains this proviso is in the following terms: "Declaring nevertheless, that notwithstanding the preceding condition, restriction, and irritancy, yet if any of the heirs of tailzie, male or female, above mentioned, shall happen to marry an heiress or heir of another estate, or shall succeed to another estate settled under the like condition, of carrying a particular surname and arms, and under the like irritancy, it shall be lawful to the persons so marrying, or so succeeding to such an estate, to make such addition to their surname and arms as shall be necessary; they always retaining the surname of Dundas, and arms of Dundas of Kerse, and using the name in the first place, and carrying the arms first and fourth, where that may be consistent with the settlements of the said other estate."

Sir Laurence was therefore clearly sensible, when he inserted this proviso, of his having exceeded the powers reserved to him in his articles of marriage, and of the probability there was of the preceding condition in an eventual case defeating entirely that obligation which he had come under to the issue-male of his son's marriage; and he attempts to remove that objection by the insertion of

of this proviso. But this clause, however intended, falls short of its purpose. For, in the *first* place, it affords no remedy in the common and most usual case where an estate opens to any of the heirs of the marriage under the condition of the heirs bearing a certain surname and arms *alone*, without the addition of any other title or name whatsoever; and with a prohibition of quartering any other arms with those which have hitherto been borne by the proprietors of such estate. In the *next* place, It does not provide for the case of any estate which obliges the heir succeeding to it to bear a certain surname and arms *first*, although it may permit a conjunction of another arms upon an inferior footing; a case which is still more common than the former, and which is precisely the same with that which Sir Laurence annexes to those heirs called under this entail. *Lastly*, It does not provide against the case of one of the heir's succeeding to an estate which carries along with it a title or dignity of honour. Indeed, so far from providing against that case, Sir Laurence, in the clause immediately subsequent, clearly declares his resolution, that no heir whatsoever, who shall succeed to a Peerage or title of honour, or who shall even be a presumptive heir to such honour, shall ever inherit these estates. " It is hereby expressly provided and declared, That in case the succession to the said lands and estate above written shall fall and devolve upon the second son of the said William Marquis of Lothian, or the heirs-male of his body, or upon the third or any other younger sons of the Marquis, or the heir-male of their bodies, who may happen also to have succeeded, or thereafter to succeed, to the honour, title, and dignity, of Marquis of Lothian, whereby my name and family will be absorbed and sunk in the said name and dignity; in that case, the second or other younger son of the said Marquis of Lothian succeeding to the said lands and estate by virtue of this present tailzie, shall, upon their succession to the said title and dignity, forfeit, amit, and loose, for themselves and their presumptive heir of tailzie under this settlement, all right and title whatever to my said lands and estate," &c.

Here your Lordships have decided evidence, under Sir Laurence's own hand, of his intention to defeat the obligation he had formerly come under in his son's marriage-contract, by prohibiting any of the heirs of entail who might succeed to the dignity of

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Marquis of Lothian from inheriting at the same time any of the estates contained in this entail. He was certainly intitled to annex that condition to any of the remoter substitutes who were not provided for in Sir Thomas's marriage-articles. But as it was clearly his intention to prevent any heir whatever succeeding to a peerage from enjoying at the same time any part whatever of his Scotch estates; so your Lordships will undoubtedly consider, that the preceding clause or proviso with regard to the surname and arms was not intended by him for the purpose of allowing this self-same estate to be swallowed up and absorbed in any different peerage, which his grandson, or any other heir of the marriage, might happen to succeed to. But as it was out of his power to prevent them from succeeding to any such estate or peerage which might afterwards open to them, so it was equally out of his power to clog them, in that event, with a condition which amounts to a total forfeiture of those estates which he expressly became bound to provide and secure to them by his son's marriage-articles. He thereby reserved power of preserving these estates in their possession, by laying them under conditions which might be effectual for that purpose; but that reserved power can never apply to a condition which, so far from preserving these estates in the persons of the heirs of the marriage, clearly defeats that end, by forfeiting their right to the property of the whole.

The defender has no occasion to dip into the other arguments which are treated of in the information for Sir Thomas Dundas, the pursuer, and in that for the other defenders; because, as already observed, he concurs with the last in all the other defences which they have pled in bar of the pursuer's reduction. He submits to your Lordships, that he is intitled to set aside the above-mentioned deed of entail 1768, in so far as regards the lands and estates lying within the counties of Stirling, Clackmannan, and Fife, provided to him and the other children of the marriage by the articles of agreement 1764; Sir Laurence having thought proper to exceed the powers reserved by him in these articles, and materially defeated the right which the defender's mother, and her relations, stipulated for him in the contract of marriage.

In respect whereof, &c.

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